BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARGARET LEANN OLDS-CARTER	)	
Claimant	)	
	)	
VS.	)	
	)	
LAKESHORE FARMS, INC.	)	
Uninsured Respondent	)	Docket No. **1,035,967**
	)	
AND	)	
	)	
KS. WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund and respondent requested review of the February 23, 2009 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on June 9, 2009.

APPEARANCES

Timothy J. Pringle of Topeka, Kansas, appeared for the claimant. John D. Jurcyk of Roeland Park, Kansas, appeared for the uninsured respondent. Matthew R. Bergmann of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On July 18, 2007, claimant sustained injuries when she lost control of the truck she was driving. In the February 23, 2009 Award, the Administrative Law Judge (ALJ) found claimant sustained a 38.5 percent work disability based upon a 38 percent task loss and a 39 percent wage loss.

The ALJ made the following key findings: (1) claimant worked for respondent as an employee rather than an independent contractor; (2) respondent was not involved in an agricultural pursuit; (3) claimant's average weekly wage was $471.53; (4) respondent's payroll was sufficient to bring respondent under the jurisdiction of the Workers

Compensation Act (Act); (5) claimant's accident arose out of and in the course of her employment with respondent; (6) claimant sustained a 38 percent task loss; (7) claimant failed to make a good faith effort to find other employment; and (8) claimant had an imputed wage loss of 39 percent. In addition, the ALJ assessed the award against both the respondent and Fund.

The Fund and respondent have raised the following issues on appeal: (1) whether claimant worked for respondent as an employee or, instead, as an independent contractor; (2) whether claimant's accident arose out of and in the course of her employment with respondent; (3) whether respondent's payroll was sufficient to subject respondent to the jurisdiction of the Act; (4) the nature and extent of claimant's disability; (5) claimant's average weekly wage; and, (6) the Fund's liability.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent, Lakeshore Farms, Inc., is owned by Jonathan L. Russell, who is the sole officer, director, and shareholder. The company is incorporated and owns a 2006 Hummer, a 2007 Cadillac Escalade, two combines, three tractors, planters, sprayers and other farming equipment. The company also owns several semi-trucks and leases several trailers, which are used to haul grain. Respondent does not own any farmland as the land (6500 rented acres) is provided by Mr. Russell who pays respondent for using its equipment. Most, if not all, of the revenue generated by respondent is used to make the payments on its equipment. The proceeds from Mr. Russell's farming operation (mostly corn and soybeans) is split 60/40, with Mr. Russell retaining the larger share.

Besides hauling Mr. Russell's grain, respondent's trucks and trailers are also used to haul for others in hopes of generating gross revenue of at least $2,400 a month (or perhaps per week) to pay the notes and others costs associated with the trucks. Mr. Russell is unable to estimate the percentage of time respondent's trucks and trailers are used for hauling his grain as opposed to being used for others.

Mr. Russell contends the truck drivers are told they are independent contractors and that no taxes will be withheld from their paychecks. The drivers receive 25 percent of the gross revenues received per load hauled. At the end of each week the drivers turn in their load sheets from which they are paid. In claimant's case, respondent bills the customer for the loads she hauls and the customer submits payment directly to respondent. Respondent pays for the fuel, maintenance, repair, insurance, licenses and obtains U.S. Department of Transportation permits and certificates for the trucks.

Mr. Russell also testified that respondent is required by law to place its drivers in a pool for random drug testing. On a form dated June 2007 that lists respondent's drivers who are subject to random testing, claimant and five others are listed as employees.

Claimant began working for respondent full-time on March 5, 2007, driving one of its semi-trucks. Her job duties included hauling grain with one of respondent's grain wagons. When not hauling grain for respondent, claimant was expected to contact brokers and arrange to haul for others. But, according to claimant, Mr. Russell's grain took priority over any other loads she obtained.

> Q. Counsel asked you some questions about the rate you were being paid for bushels of grain that were being hauled. If you happened to have a, you know, job that you could do for Bartlett or Cargill that was paying 30 cents a bushel but Mr. Russell called and said, "I want you to haul some grain from this elevator at 17 cents a bushel," which job would you have to take?
>
> A. Mr. Russell's.
>
> Q. Why?
>
> A. Because he was our boss. He's the one we drove for.
>
> Q. And it's his truck?
>
> A. His truck.
>
> Q. And even though the Bartlett or Cargill may pay a lot more, you would still haul for Mr. Russell?
>
> A. Yes.[1]

Claimant further explained how her pay was calculated:

> Q. Okay. And how would you get paid?
>
> A. It was -- we'd haul it, do our load sheets, take the amount that -- like 40 cents a bushel, 25 cents a bushel, whatever it was paying, we'd take it times the gross bushels that we had on the trailer, and that full amount would go to the truck, and then we would divide it by four.

[1] *Id.* at 54.

> Q. Now, were there times that Mr. Russell would direct you as to who you were going to haul for?
>
> A. Yes.[2]

When hired by respondent claimant spoke with Mr. Russell, who told claimant no taxes would not be withheld from her checks. Claimant denies she was told that she would be an independent contractor. The parties did not enter into any written agreement. Indeed, several of respondent's drivers testified in this proceeding and none had written agreements with respondent.

William V. Carter, claimant's husband, drove for respondent from February through September 8, 2007. He testified that Mr. Russell's requests to haul a load took priority over any other loads. Mr. Carter confirmed that when he hauled for somebody other than Mr. Russell the money for that load was paid directly to respondent, which then paid him 25 percent. Jeri R. Lee, one of respondent's drivers, also testified that Mr. Russell was her boss and that his loads were given priority over any others. Ms. Lee worked for respondent from June 18 until October 6, 2007.

Conversely, Michael E. Jones, testified he had been driving a truck for respondent since the fall of 2005 but that he seldom hauled Mr. Russell's grain because he usually was hauling for others. And Stephen Hutton testified he had been driving for respondent since the Spring of 2006. Finally, Gary Wheeler testified he had driven for respondent since February 2006 and that he primarily drove over-the-road. All three gentlemen indicated that respondent did not control their work and that only they decided what loads they hauled. Mr. Hutton, who also primarily drove over-the-road, indicated he would decline hauling loads for Mr. Russell about half the time Mr. Russell asked.

On July 18, 2007, claimant was en-route to pick up a load of corn at the Robinson, Kansas, elevator and take it to an ethanol plant in Garnett, Kansas. About three quarters of a mile north of Robinson, Kansas, claimant lost control of her truck when her right front tire dropped off the road while on a curve. Claimant was transported by ambulance to Hiawatha County Hospital's emergency room. She was diagnosed with a burst compression fracture to the L2 vertebra.

Two doctors evaluated claimant and testified regarding the extent of her functional impairment. At her attorney's request, in April 2008, claimant was examined by Dr. Peter V. Bieri, who is board certified in disability evaluations. Dr. Bieri rated claimant as

[2] P.H. Trans. at 16.

having a 7 percent whole person impairment under the AMA *Guides*[3] for the compression fracture. Dr. Bieri also suggested permanent work restrictions; namely, that claimant's occasional, frequent, and constant lifting be limited to 20, 10, and 5 pounds, respectively; that she avoid repetitive bending and stooping; and that she limit captive positions to no more than 30 to 45 minutes.

At the Fund's request, in November 2008, orthopedic surgeon Dr. Phillip L. Baker examined claimant. Using the AMA *Guides,* the doctor rated claimant as having a 7 percent whole person impairment for the compression fracture in her vertebrae (which he thought was at *L1*) and a 5 percent whole person impairment for degenerative changes in her lower lumbar spine. Believing that 3 percent of claimant's impairment from the degenerative changes in her low back preexisted the accident, the doctor opined that claimant sustained a 9 percent whole person impairment as a direct result of the July 2007 accident.

Dr. Baker also provided his opinion regarding what work restrictions claimant should now observe. Although the doctor believes claimant needs no restriction for the compressed vertebra, he thinks claimant should be restricted to the medium labor category of work for her degenerative lumbar changes. In other words, claimant should limit her constant lifting to 10 pounds or less, frequent lifting to 20 pounds or less, and occasional lifting to 50 pounds or less.

On January 3, 2008, claimant was issued a medical release to return to work. When she testified at the October 2008 regular hearing, she had not returned to work as she testified she had been unable to find work.

CONCLUSIONS OF LAW

Jurisdiction of the Act

Initially, it is argued that this accident does not fall under the jurisdiction of the Act for three reasons; namely, (1) that respondent was engaged in an agricultural pursuit; (2) claimant failed to prove respondent had the requisite payroll; and, (3) claimant worked for respondent as an independent contractor rather than an employee.

K.S.A. 44-505 reads, in part:

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> > (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state . . .

The record shows that Mr. Russell farmed several thousand acres, but Lakeshore Farms, Inc., did not plant, cultivate, or harvest any crops. The issue of whether claimant was engaged in an agricultural pursuit at the time of her accident is controlled by the *Frost*[4] decision. In that decision the Kansas Court of Appeals held that determining whether an injured worker was engaged in an agricultural pursuit at the time of an accident requires a two-step analysis. The first question is whether the employer was engaged in an agricultural pursuit. If the answer is 'no', then the court may find there is coverage under the Act. If the answer is 'yes', then the court must determine if the accident occurred while the employee was engaged in an employment incidental to the agricultural pursuit.

Here, respondent's business was leasing equipment to Mr. Russell for use in his farming operation. In addition, respondent conducted a commercial trucking enterprise. Neither a leasing company nor a commercial trucking company should be considered agricultural pursuits as that term is commonly understood. Respondent argues that it was engaged in agriculture because it leased farm equipment and its truckers hauled grain. The Board disagrees. Moreover, respondent hauled more than grain as at least one of respondent's numerous drivers, Mr. Hutton, pulled a flat bed trailer.

The Board concludes that respondent's trucking operation should not be considered an agricultural pursuit. Likewise, the Board concludes claimant was not engaged in an employment incidental to an agricultural pursuit at the time of her accident.

Next, it is argued that respondent did not satisfy the payroll requirements to come under the jurisdiction of the Act. K.S.A. 44-505(a)(2) provides that the Act does not apply to:

> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar

[4] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 760 P.2d 43, *rev. denied* 243 Kan. 778 (1988).

> year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

The greater weight of the evidence establishes that at the time of claimant's accident respondent should have reasonably estimated that it would have a payroll greater than $20,000 for the calendar year. As of the date of accident claimant had earned more than $8,900. Moreover, one of respondent's other truck drivers, Gary Wheeler, testified that he received approximately $38,000 to $40,000 driving for respondent in 2006 and approximately $50,000 from respondent in 2007. In addition, respondent had several other drivers operating its trucks in 2007. In short, respondent had sufficient payroll to bring it under the jurisdiction of the Act.

The next issue is whether claimant worked for respondent as an employee or as an independent contractor. It is often difficult to determine whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[5]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[6] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[7]

The test primarily used by the courts in determining whether an individual is an employee is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[8]

---

[5] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[6] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[7] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[8] *Wallis* at 102-103.

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[9]

The evidence contains elements pertaining to both an employee and independent contractor relationship. However, the Board concludes the evidence is more heavily weighted in finding that claimant was an employee of the respondent. Respondent provided the truck that claimant drove and paid for all of its related expense. Moreover, respondent could control the loads claimant would haul. Although the right to control claimant's work was not frequently exercised, nonetheless, the preponderance of the evidence established respondent could direct what loads claimant would haul. Moreover, if claimant did not generate at least $2,400 per month the respondent had the right to discharge her. Furthermore, the work claimant was performing was an integral part of the respondent's commercial truck operations.

Other factors also tend to show that claimant was an employee of respondent: claimant and respondent had an ongoing relationship similar to that of an employer and employee; the absence of a contract to perform a certain piece of work at a fixed price; claimant did not hold herself as a separate business entity or trucking company, or conduct business separate and apart from driving respondent's truck; and, claimant was not obliged to provide repairs to the truck she drove or provide any tools, materials, or supplies. When considering the entire record, the Board finds and concludes that it is more probably true than not that claimant was an employee of respondent at the time of her July 2007 accident.

[9] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

Nature and extent of disability

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[10]

Dr. Bieri rated claimant as having a 7 percent whole person impairment under the AMA *Guides* for the compression fracture. Dr. Baker rated claimant as having a 7 percent whole person impairment for the compression fracture in her vertebrae, a 5 percent whole person impairment for degenerative changes in her lower lumbar spine for a 12 percent whole person impairment. But believing that 3 percent of claimant's impairment from the degenerative changes in her low back preexisted the accident, the doctor opined that claimant sustained a 9 percent whole person impairment as a direct result of the July 2007 accident. However, Dr. Baker agreed that he had no medical records that indicated claimant had suffered from back pain before the accident. Nor did the doctor have any records indicating claimant's preexisting degenerative condition was symptomatic.

The Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.[11] (Emphasis Added)

And functional impairment is defined by K.S.A. 44-510e(a), as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) requires that functional impairment be determined based upon AMA *Guides*. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria. Requiring the application of the same standard in

[10] K.S.A. 44-510e(a).

[11] K.S.A. 2008 Supp. 44-501(c).

the determination of both the preexisting as well as the current functional impairment percentage results in a final comparison of equal value percentages. A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of her activities in the intervening years in order to determine the preexisting impairment.[12] Those factors must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Dr. Baker's opinion regarding a preexisting percentage of impairment for claimant's degenerative back condition failed to adequately consider claimant's condition before the accident nor did he have any medical records of claimant's condition before the accident. And Dr. Baker did not explain how he utilized the AMA *Guides* to determine claimant had a 3 percent preexisting impairment. Consequently, the Board concludes respondent has not met its burden to establish claimant suffered any preexisting impairment.

The medical opinions regarding claimant's functional impairment ranged from Dr. Bieri's 7 percent to Dr. Baker's 12 percent. The Board finds that equal weight should be given to each opinion and concludes claimant has met her burden of proof to establish that she suffered a 9.5 percent whole person functional impairment.

Because claimant's back injury is not compensated under the schedule in K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e(a), which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

After the parties filed their briefs with the Board, the Kansas Supreme Court issued its decision in *Bergstrom.*[13] In that decision the Kansas Supreme Court interpreted K.S.A.

---

[12] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[13] *Bergstrom v. Spears Mfg. Co.*, ___ Kan. ___, 214 P.3d 676 (2009).

44-510e and ruled that it is not proper to impute a post-injury wage when calculating the wage loss in the statute's permanent partial general disability formula. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[14]
>
> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[15]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[16]

Before *Bergstrom*, claimant's effort to obtain other employment would have been an issue for the Board to consider in determining whether claimant's actual post-injury wages or her wage-earning ability should be used in computing her permanent partial general disability under K.S.A. 44-510e. But *Bergstrom* makes clear that good faith is not an element of the permanent partial general disability formula and those earlier Kansas Court of Appeals cases that treated good faith as an element of the formula are no longer

---

[14] *Id.*, Syl. ¶ 1.

[15] *Id.*, Syl. ¶ 3.

[16] *Id.*, slip op. at 4.

valid. Consequently, claimant's actual post-injury earnings must be used in computing her permanent partial general disability. Because claimant has not found other employment, the Board finds claimant has a 100 percent wage loss.

Both Drs. Bieri and Baker provided opinions regarding the tasks claimant performed in the 15 years before her July 2007 accident that she should no longer perform as a result of the accident.

Dr. Baker reviewed a list of claimant's former work tasks prepared by Michelle Sprecker, a vocational rehabilitation counselor, and concluded claimant could no longer perform at least 1 of the 44 nonduplicative tasks for a 2 percent task loss. Dr. Bieri reviewed the task list prepared by Dick Santner and determined claimant should no longer perform 8 of the 21 nonduplicative tasks, or 38 percent.

The Board accords equal weight to both opinions and concludes that claimant has sustained a 20 percent task loss for purposes of the permanent partial general disability formula. Averaging claimant's 100 percent wage loss with her 20 percent task loss, the Board concludes claimant has sustained a 60 percent permanent partial general disability.

Fund Liability

The parties do not dispute that respondent does not have workers compensation insurance that would pay claimant whatever benefits she is entitled to receive in this claim. Accordingly, the Fund was brought into this claim under K.S.A. 44-532a(a), which provides:

> If an employer has no insurance to secure the payment of compensation, as provided in subsection (b)(1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund.

And when the Fund pays benefits on behalf of an uninsured employer, the Fund is entitled to pursue reimbursement. K.S.A. 44-532a(b) provides:

> The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.

Administrative regulations entitle the Fund to a hearing on the question of its liability under K.S.A. 44-532a. K.A.R. 51-15-2 provides, in part:

> (a) Insurance carriers and self-insureds shall not withhold compensation from an injured employee during negotiations with the workers compensation fund but shall pay compensation due under the act and then seek reimbursement for any compensation paid.
> (b) The workers compensation fund shall be entitled to a hearing on the question of its liability imposed by the provisions of K.S.A. 44-532a. The administrative law judge may award compensation pursuant to K.S.A. 44-532a against the workers compensation fund following a preliminary hearing if the fund was properly impleaded and given the statutory notice of the hearing.

The Kansas Court of Appeals considered the Fund's liability under K.S.A. 44-532a in the *Helms*[17] decision and held that the injured worker does not have the burden to prove an employer is uninsured or unable to pay an award of benefits before an award may be entered against the Fund. The burden therefore lies with the Fund to prove an employer is financially able to pay the compensation due claimant under the Act. Nevertheless, there is sufficient evidence in this record to establish a prima facie case that respondent is financially unable to pay claimant's workers compensation benefits. Mr. Russell's testimony is uncontradicted that all but one of respondent's semi-trucks is encumbered. Likewise, the evidence establishes that respondent's combine is encumbered and the trailers that respondent possesses are leased. There is no evidence of respondent's equity. Mr. Russell's testimony is also uncontradicted that the payments he makes to respondent is primarily used to pay the notes on respondent's equipment.

The Board concludes the Fund is responsible for paying claimant's benefits in this claim and may pursue respondent for reimbursement as contemplated by K.S.A. 44-532a(b).

Average Weekly Wage

The claimant testified that her average weekly wage was $471.53. The ALJ adopted that figure noting that claimant's testimony was uncontradicted. But respondent argues that figure should be reduced by the amount claimant spent on food and lodging when she traveled. Simply stated, there was no evidence that respondent paid claimant for those items. The Board affirms the finding that claimant's average weekly wage was $471.53.

[17] *Helms v. Pendergast*, 21 Kan.App.2d 303, 899 P.2d 501 (1995).

Finally, it should be noted that when the October 2008 regular hearing was held, claimant had $8,020.75 in outstanding medical bills that she had incurred as a result of her July 2007 accident. An exhibit listing the providers and amounts owed was offered and admitted without objection. The Board finds that the unpaid medical bills claimant incurred as a result of this accident and itemized in Claimant's Exhibit 1 at the regular hearing are to be paid by the Fund.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated February 23, 2009, is modified to reflect the claimant suffered a 60 percent permanent partial disability and liability is assessed against the Fund.

The claimant is entitled to 24 weeks of temporary total disability compensation[18] at the rate of $314.37 per week or $7,544.88 followed by 243.60 weeks of permanent partial disability compensation at the rate of $314.37 per week or $76,580.53 for a 60 percent work disability, making a total award of $84,125.41.

As of February 26, 2010, there would be due and owing to the claimant 24 weeks of temporary total disability compensation at the rate of $314.37 per week in the sum of $7,544.88 plus 112.29 weeks of permanent partial disability compensation at the rate of $314.37 per week in the sum of $35,300.61 for a total due and owing of $42,845.49, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $41,279.92 shall be paid at the rate of $314.37 per week for 131.31 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

[18] R.H. Trans. at 34.

c: Timothy J. Pringle, Attorney for Claimant
John D. Jurcyk, Attorney for the Uninsured Respondent
Matthew R. Bergmann, Attorney for Fund
Rebecca A. Sanders, Administrative Law Judge